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**(2012) 06 AHC CK 0065**  
**In the Allahabad High Court**  
**Case No : Service Bench No. 450 of 2012**

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| Utsav Chaturvedi         | Vs | APPELLANT  |
| State of U.P. and Others |    | RESPONDENT |

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**Date of Decision :** 25-06-2012

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 233, 233(1), 233(2)

**Citation :** (2012) 7 ADJ 127 : (2013) 1 ALJ 732 : (2012) 6 AWC 5574

**Hon'ble Judges :** Satish Chandra, J;Devi Prasad Singh, J

**Bench :** Division Bench

**Advocate :** L.P. Misra and Deepanshu Dass, for the Appellant; Manish Kumar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. Heard Sri Sandeep Dixit, learned counsel appearing for the petitioner as well as learned Chief Standing Counsel. Petitioner, who is a member of provincial Judicial Services of State of Madhya Pradesh had applied for U.P. Higher Judicial Services Exam, 2012 in pursuance to the impugned advertisement as contained in Annexure No. 1. The instant writ petition has been preferred challenging Rules 13(2) and 17(2) of the U.P. Higher Judicial Service Rules, 1975 (in short, "the Rules") to declare it illegal, arbitrary and ultra vires to the Constitution of India being hit by Articles 14, 16 and 233(2) of the Constitution of India.

Further, the petitioner has prayed for a writ in the nature of certiorari to quash the impugned advertisement by which the judicial officers have been deprived to appear in the examination of U.P. Higher Judicial Services. An alternative prayer has also been made not to proceed with the impugned advertisement.

Rules 13(2) and 17(2) of the U.P. Higher Judicial Services Rules, 1975 are reproduced as under:

Rule 13(2)--The candidates for direct recruitment must produce a certificate of good character from the District Judge of the district in which they have been

practicing, and in the case of candidates normally practicing in the High Court, from the Registrar of the High Court and also from two responsible persons of status (not related to candidates) who are well acquainted with them in private life and are unconnected with their University, College or School.

Rule 17(2)--The application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practicing, and in the case of members of the Bar normally practicing in the High Court, through the Registrar of the High Court. The application shall be accompanied by certificate of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be required to be furnished.

2. A plain reading of the aforesaid Rules reveals that, with regard to direct recruitment, it shall be incumbent upon the applicant to produce a certificate of good character from the District Judge of the district in which they have been practicing, and in the case of candidates normally practicing in the High Court, the certificate is to be obtained from the Registrar of the High Court. Such application shall be submitted through the District Judge within whose jurisdiction the candidate has been practicing, and in the case of members of the Bar normally practicing in the High Court, such application shall be submitted through the Registrar of the High Court along with the testimonials.

3. While assailing the impugned Rules, it has been stated by the learned counsel for the petitioner that the Rules framed by the respondents are violative of Article 233 of the Constitution of India. Article 233 of the Constitution of India is reproduced as under :

Article 233(1)--Appointment of district judges.--(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

Article 233(2)--A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. The sum and substance of arguments advanced by the learned counsel for the petitioner is that under Clause (2) of Article 233, a person shall be entitled to appear in the examination in question, in case he rendered seven years or more practice at Bar earlier to joining of Judicial Services.

4. Submission of the learned counsel for the petitioner is that the petitioner is Civil Judge (Class-II) and he was selected in the P.C.S. (J) examination of Madhya Pradesh and in consequence thereof, he resumed duties on 27.8.2008 and thereafter he is serving in the Madhya Pradesh Judicial Services. Since he has practiced more than seven years before joining the judicial services of Madhya Pradesh, he claims to be entitled to appear in the U.P. Higher Judicial

## Services Examination.

5. While interpreting Clause (2) of Article 233 of the Constitution of India, it has been stated by the learned counsel for the petitioner that it is not necessary that the applicant must be a practicing advocate at the time of advertisement. Any person rendered seven years of practice at Bar, till the last date of eligibility and had joined the judicial services like the petitioner shall be entitled to appear in the examination with consequential benefits.

6. Clause (2) of Article 233 starts with the word "already" which means the candidate should not be in service of union or state. In Law Lexicon by P. Ramanatha Aiyar, 2009 Edition the word "already" has been defined as under :

Already. Does not mean at some time previously, but, means at the time stated and immediately preceding thereto.

Keeping in view the aforesaid definition, in case the word "already" is considered, then it means "immediately preceding" on the date of advertisement, the person should not be employee of state or union service.

7. The next condition emerging from Article 233 is that the person has been for not less than seven years an advocate or a pleader Constitutional framers has used the word "has been".

8. Shri Sandeep Dixit, learned counsel for the petitioner may not be in correct while making submission that the word "has been" may include past incidents. However Hon"ble Supreme Court in the case in Secretary, Regional Transport Authority, Bangalore and Another Vs. D.P. Sharma and Others, , held that the expression "has been" denotes transaction prior to the enactment of the statute in question or a transaction after coming into force of the statute, has to be gathered from the provision, in which the expression "has been" occurs or from the other provision of the statute.

Accordingly the expression "has been" contained in Article 233 is to be looked into keeping in view the overall reading of Article 233 including the word "already" Under clause (2) of Article 233 the expression has been used in continuous tense which denotes that the person must have been a practicing advocate.

9. Learned counsel for the respondents has relied upon the case in Sushma Surt v. Government of National Capital Territory of Delhi and another, (1991) 1 SCC 330 In the case of Sushma Sun (supra), under the Delhi Higher Judicial Services Rules, a question was raised that a person holding office of Law Officers shall be entitled to appear in the examination of Higher Judicial Services

10. After considering the rival submission, the Hon"ble Supreme Court ruled that if a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate Their Lordships further held that whenever a person is appointed as

Pleader or Government Advocate and appears in Court without surrendering the certificate of registration to Bar Council he shall be deemed to be an advocate and be entitled to appear in the examination.

Relevant portions of the aforesaid judgment of the Hon''ble Supreme Court are produced as under:

6. If a person on being enrolled as an advocate ceases to practice law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any Corporate body or person practices before Court as an advocate for and on behalf of such Government, Corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case.

10.... What is of essence is as to what such Law Officer engaged by the Government does - whether he acts or pleads in Court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the Body Corporate. Therefore, Bar Council of India has understood the expression "advocate" as one who is actually practising before Courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

11.... We think it is in this manner that the expression used in Article 233(2) of the Constitution has to be understood and the rules framed by the Delhi Administration in this regard have to be read in the light of the constitutional provisions. The expression used from the Bar" would only mean from the class or group of advocates practising in Courts of law. It does not have any other attribute.

11. The letter and spirit of Sushma Suri's case (supra) is that immediately after joining the employment a person shall surrender the certificate to the Bar Council concerned, hence shall ceases to be an advocate. Thus, while interpreting Article 233(2) of the Constitution of India in Sushma Suri's case (supra), it has been held by the Hon''ble Supreme Court that a person who has surrendered certificate of registration to the Bar Council and ceases to practice in the Court shall not be entitled to appear in the Higher Judicial examination. The effect of Clause (2) of Article 233 is that a candidate must be a practicing advocate, whose certificate should not have been surrendered to the Bar Council. Meaning thereby if a person is appointed in the judicial services and surrender the certificate of registration ti State Bar Council then whatever experience he has got as a member of Bar its benefits cannot be made available to such person under the garb of Clause (2) of Article 233 of the Constitution of India to enable him to appear in U.P. H.J.S. Exam.

The aforesaid proposition of law finds force from another judgment of Hon''ble Supreme Court in the case reported in earlier case in Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, , followed by later judgment.

12. In the case of Satya Narain Singh (supra), their lordships of Hon''ble Supreme Court interpreted the word "service" as contained in Article 233 of the Constitution of India. Service means the "judicial service" in terms of Article 233(2) of the Constitution of India. The relevant portions of the aforesaid judgment of Satya Narain Singh's case is reproduced as under :

4. In Chandra Mohan v. State of Uttar Pradesh (supra) Subba Rao, C.J. after referring to Articles 233, 234, 235, 236 and 237 stated,-

The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and pro motion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district Courts and Courts subordinate thereto, subject to certain prescribed limitations.

Subba Rao, CJ. then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service. After pointing out that Article 233(1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state,

But the sources of recruitment are indicated in clause (2) thereof. Under Clause (2 of Art. 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader.

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary Contrary to Article 14 and Article 16 of the Constitution.

13. Admittedly, the petitioner is a judicial officer. He shall be deemed to be in

judicial service and there appears to be no reason to doubt that because of joining in the judicial service he ceases to be an advocate. Nothing has been brought on record that the petitioner is entitled to retain the certificate of registration granted by the Bar Councilor entitled to practice law.

14. Section 23 of the Advocates Act, 1961 provides that only the advocate alone will be entitled to practice law. Section 45 of the Advocates Act further provides that any person who practices in any Court or before any authority or person not entitled to practice under the provision of Advocates Act may be punished with the imprisonment which may extend to six months.

15. It shall always be obligatory for the person to surrender the certificate to the State Bar Council after joining the services. Otherwise also a person got an employment shall not be entitled to practice at Bar. Accordingly, keeping in view the letter and spirit of Article 233(2) of the Constitution person who is not an advocate or possess right to practice under the Advocate Act shall not be entitled to appear in the examination of Higher Judicial Services. Needless to say that persons appointed under Article 233 are different class in itself chosen from bar within their respective quota. Substantial major portion of cadre is filled up by promotees from subordinate judicial services PCS (J).

16. Learned counsel for the petitioner vehemently relied upon the case in Shankar K. Mandal and Others Vs. State of Bihar and Others, .

17. The case of Shankar K. Mandal (supra) relates to the recruitment process of Government employee. The relevant paragraph 5 and 6 of the aforesaid judgment of the Hon"ble Supreme Court are reproduced as under :

5. Pursuant to the directions contained in the earlier judgment of the High Court as affirmed by this Court, a fresh exercise was undertaken. Since the present appellants were not selected, writ petitions were filed before the High Court. In the writ petition which was filed by 55 persons and disposed of by the Division Bench the conclusions were essentially as follows: (1) Some of the writ petitioners (Writ petitioners Nos. 5, 18, 23, 28, 41 and 53) were over age at the time of their initial appointment and their cases were, therefore, wholly covered by the directions given by the High Court, and they were not entitled to relaxation of age; (2) So far as writ petitioners Nos. 6, 26, 30 and 55 are concerned, the stand was that they had not crossed the age limit at the time of making the applications for appointment and, therefore, were within the age limit at the time of initial appointment and were, therefore, entitled to relaxation of age in terms of the judgment passed by the High Court earlier and affirmed by this Court. This plea was turned down on the ground that what was relevant for consideration related to the age at the time of initial appointment and not making of the application; (3) As regards writ petitioner No. 24, he was under age at the time of appointment. He was permitted to file a representation before the Director of Primary Education and the High Court ordered that his case would be considered afresh; (4) In respect of writ petitioners Nos. 9 and 17, it was

noted that they were refused absorption on the ground that they had not made any application in response to advertisement issued pursuant to the order passed by this Court. Since no material was placed to substantiate this stand and no reasons had been communicated for non-absorption, direction was given to consider representations if made by them within one month from the date of judgment. The said judgment is under challenge in C.A. No. 916/1999. Appellants have taken the stand that in terms of this Court's judgment, a person who was not over age on the date of initial appointment was to be considered. Though it was conceded before the High Court that they were over age at the time of initial appointment, much would turn as to what is the date of initial appointment. The High Court had not considered as to what was the applicable rule so far as the eligibility regarding age is concerned. Learned counsel appearing for the respondent-State however submitted that having made a concession before the High Court that they were over age on the date of appointment, it is not open to the appellants to take a different stand. The crucial question is whether appellants were over age on the date of their initial appointment. It is true that there was concession before the High Court that they were over age on the date of initial appointment. But there was no concession that they were over age at the time of making the application. There was no definite material before the High Court as to what was the eligibility criteria so far as age is concerned. No definite material was placed before the High Court and also before this Court to give a definite finding on that aspect. What happens when a cut off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any nonprescription has been considered by this Court in several cases. The principles culled out from the decisions of this Court (See Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another, , Bhupinderpal Singh and Others Vs. State of Punjab and Others, and Jasbir Rani and Others Vs. State of Punjab and Another, ) are as follows:

- (1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules;
- (2) If there is no cut off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications; and
- (3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

6. It has, therefore, to be decided by the authorities as to which of the three conditions indicated above were applicable to the facts of the case. In the absence of definite material, we think it appropriate to direct the authorities to take a decision within a period of four months from today, as to whether the appellants or one of them was eligible by applying the tests indicated above. These directions shall apply to the writ petitioners who are appellants in the

present appeal and to nobody else. The other directions given by the High Court so far as the writ petitioners Nos. 9, 17 and 24 are concerned do not warrant any interference as there has been no challenge by the State Government.

18. It has been submitted by the learned counsel for the petitioner that since the petitioner fulfilled the requisite condition of seven years at Bar before the cut off date before joining of Judicial Services he shall be entitled for selection and appointment in U.P. Higher Judicial Service. The argument advanced by learned counsel for the petitioner seems to be misconceived.

19. The case of Shankar K. Mandal (*supra*) does not relate to situation envisage under Article 233 of the Constitution of India and considered by the Hon''ble Supreme Court (*supra*). Recruitment process with regard to ordinary Government service and with regard to judicial services may be different. So far as Higher Judicial Services are concerned, it is governed by the condition contained in Article 233 of the Constitution of India. Article 233 has been interpreted by the Hon''ble Supreme Court in catena of judgments, out of which aforesaid two judgments referred herein above would reveal that on the cut of date or at the time of recruitment, the candidate must be the member of Bar or a practicing advocate. In case he has requisite experience, but he is not the member of Bar or practicing advocate then keeping letter and spirit of Article 233 of the Constitution of India, he shall not be entitled to appear in the Higher Judicial Services.

20. So far as the validity of impugned Rules are concerned, they do not seem to be ultra vires to the Constitution. In case, the Rules in question are considered in the light of aforesaid judgment of the Hon''ble Supreme Court, it appears to be introverts regulating the condition of recruitment. In view of above, the writ petition is devoid of merit and the same is hereby dismissed in limine.